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No. ___

IN THE

Supreme Court of the United States

DEMETRIOS KARAMANOS AND RICHARD PEDRONI,
Petitioners,

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a federal prosecution for conspiracy and wire fraud for evading state and local taxes is barred by Federalism principles and the Tenth Amendment of the United States Constitution.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT	2
REASONS FOR GRANTING THE PETITION	4
I. THE PARAMOUNT INTEREST OF THE STATES IN ENFORCING THEIR TAX LAWS	7
II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S REFUSAL TO SANCTION FEDERAL INTRUSION INTO A STATE'S SOVEREIGN AFFAIRS	8
III. CONGRESS HAS NOT AUTHORIZED THE SIGNIFICANT FEDERAL INTRUSION INTO THE STATE'S SOVEREIGNTY EVIDENCED BY THIS CASE	11
CONCLUSION	18
APPENDIX A	1a
APPENDIX B	3a
APPENDIX C	10a
APPENDIX D	18a
APPENDIX E	30a

TABLE OF AUTHORITIES

CASES	Page
Alden v. Maine, 527 U.S. 706 (1999)	9, 10
Board of Trustees v. Garrett, 531 U.S. 356 (2001)	8
Brzonkala v. Virginia Polytechnic Institute and State University, 169 F.3d 820 (4th Cir. 1999)	6
California v. Grace Brethren Church, 457 U.S. 393 (1982)	8
City of Boerne v. Flores, 521 U.S. 507 (1997)	8
Cleveland v. United States, 531 U.S. 12 (2000)	4, 6, 11, 12, 13, 14
College Savings Bank v. Florida Pre-paid Post Secondary 527 U.S. 666 (2001)	11
Cramer v. United States, 325 U.S. 1 (1945)	17
Federal Maritime Commission v. South Carolina State Ports Authority, 122 S. Ct. 1864, No. 01-46, (2002)	9
Gregory v. Ashcroft, 501 U.S. 452 (1991)	15
Griffin v. United States, 502 U.S. 46 (1991)	17
Ginsberg v. United States, 909 F.2d 982 (7th Cir. 1990)	6
Hofstetter v. Fletcher, 905 F.2d 897 (6th Cir. 1988)	6
Jones v. United States, 529 U.S. 848 (2000)	12, 14
Kimel v. Florida Board of Regents, 528 U.S. 62 (2000)	8
Lane County v. Oregon, 74 U.S. (7 Wall.) 101 (1869)	7
McNally v. United States, 483 U.S. 350 (1987)	14
Nathan v. The State of Louisiana, 73 U.S. (8 How.) 992 (1850)	7
New York v. United States, 505 U.S. 144 (1992)	8
Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981)	15

TABLE OF AUTHORITIES—Continued

Page

Porcelli v. United States, 865 F.2d 1352 (2d Cir.), *cert. denied*, 493 U.S. 810 (1989) 5
Printz v. United States, 521 U.S. 898 (1997).....8, 9, 10
Seminole Tribe v. Florida, 517 U.S. 44 (1996) 8
Tully v. Griffin, Inc., 429 U.S. 68 (1976)..... 8
Turner v. United States, 396 U.S. 398 (1970) 17
Union Pacific R.R.Co. v. Peniston, 85 U.S. 5 (1873)..... 7
United States v. Boots, 80 F.3d 580 (1st Cir. 1996) 6
United States v. Brewer, 528 F.2d 494 (4th Cir. 1975) 5, 6
United States v. DeFiore, 720 F.2d 757 (2d Cir. 1983) 5
United States v. Flaxman, 495 F.2d 344 (7th Cir.) *cert. denied*, 419 U.S. 1031 (1974)..... 6
United States v. Henderson, 386 F.Supp. 1048 (S.D.N.Y. 1974)..... 16
United States v. Lopez, 514 U.S. 549 (1995).....4, 5, 6, 8, 14
United States v. Melvin, 544 F.2d 767 (5th Cir.) *cert. denied*, 430 U.S. 910 (1977)..... 5, 6
United States v. Minarik, 875 F.2d 1186 (6th Cir. 1989) 16
United States v. Mirabile, F.2d 165 (8th Cir. 1974) 6
United States v. Morrison, 529 U.S. 598 (2000).....3, 5, 6, 8, 12, 14
United States v. Self, 2 F.3d 1071 (10th Cir. 1993) 18
United States v. Trapilo, 130 F.3d 547 (2d Cir. 1997) 6

TABLE OF AUTHORITIES—Continued

Page

Williams v. North Carolina, 317 U.S. 287 (1942) 17
Yates v. United States, 354 U.S. 298 (1957) 17

FEDERAL STATUTES

18 U.S.C. 371 ..... 2, 4, 12, 16
18 U.S.C. 1343 ..... 2, 4, 14
18 U.S.C. 1346 ..... 15, 16
18 U.S.C. 1952 15
18 U.S.C. 1961 15
28 U.S.C. 1254(1) 1
Tax Injunction Act, 28 U.S.C. 1341 7

STATE STATUTES

N.J.S.A. 2C:44-1e 11
N.J.S.A. 54:52-1 11

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PETITION FOR A WRIT OF CERTIORARI

Demetrios Karamanos and Richard Pedroni petition for a writ of certiorari to review the judgments of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix, *infra*, 3a-8a) is unpublished.

JURISDICTION

The judgments of the Court of Appeals were filed on April 18, 2002. (App., *infra*, 9a). Petitions for rehearing and rehearing *en banc* were denied on June 4, 2002. (App. *infra*, 1a-2a) The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Tenth Amendment to the United States Constitution and 18 U.S.C. 371 and 1343, are set forth in the App. *infra*, 30a.

STATEMENT

Petitioners and others were charged with (1) a conspiracy between 1989 until at least 1993 to defraud the Internal Revenue Service (IRS) and to (a) commit wire fraud by violating state excise tax laws; (b) to violate money laundering laws by transferring the proceeds of the state tax fraud; (c) to defraud the IRS; and (d) to evade federal taxes. They were also charged with the substantive offenses. After a nine-month jury trial, Petitioner Karamanos was convicted of the charges at issue and Petitioner Pedroni was convicted solely of the conspiracy charge.

Petitioner Demetrios Karamanos ("Karamanos") was a representative of Kings Motor Oil. In that capacity, Karamanos and other representatives of Kings Motor Oil purchased number 2 fuel as tax-free home heating oil from Chevron, Exxon, Conoco, Mobil, George E. Warren, and Pedroni Fuel, Inc. among other suppliers. Petitioner Karamanos was convicted of conspiracy and substantive wire fraud and money laundering charges as well as federal excise tax evasion. The district court sentenced him to 135 months in prison and ordered a special assessment of $950. (App.,*infra*, 3a-4a)

Petitioner Richard Pedroni ("Pedroni") was the President of Pedroni Fuel, a fuel supply company. Pedroni was acquitted of all 15 substantive tax and wire fraud (state tax) charges. Pedroni Fuel made sales on a tax-free basis only after it confirmed that Kings Motor Oil had federal and state licenses that permitted tax-free sales to it. Pedroni was, however, convicted on one charge, *viz.*, a single count of 18 U.S.C. § 371 conspiracy to commit four tax-related objec-

tives: (1) to commit wire fraud by evading New Jersey State excise taxes; (2) to transfer the proceeds of the State tax fraud in interstate commerce (money laundering); (3) to commit federal excise tax fraud; and (4) to hinder and impede the IRS. He was sentenced to 37 months in prison, and ordered to pay $500,000 to the IRS as restitution and nothing to the State of New Jersey. (App., *infra*, 16a, 19a)

The court of appeals affirmed. (App., *infra*, 3a *et seq.*; and 3a-8a, 18a-29a). In so holding, the court rejected Petitioners' claims that the wire fraud and conspiracy charges against them based upon the violation of the New Jersey fuel excise tax laws were defective under the Tenth Amendment and the federalist principles of the Constitution. While the court acknowledged that Petitioners' "federalism arguments [were] eloquently presented," it concluded that they were "substantively wide of the mark." App., *infra*, 4a. Invoking this Court's ruling in *United States v. Morrison*, 529 U.S. 598, 609 (2000), the court below stated that "The United States Supreme Court has consistently maintained that Congress may constitutionally regulate the 'channels' and 'instrumentalities' of interstate commerce." App., *infra*, 4a. As a result, the court concluded that "the use of the wire fraud statute to prosecute [Petitioners] did not offend Constitutional principles regarding the proper division of powers between the individual states (such as New Jersey) and the federal government." App., *infra*, 4a-5a.[1]

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[1] The court of appeals addressed the federalism issue only in its opinion in the *Karamanos* case (No. 99-5512). The argument was presented in Petitioner Karamanos' appellate briefs, pursuant to the court of appeals'orders of December 1999 and January 12, 2002, consolidating the cases and requiring the parties to address different issues in their respective briefs in order to avoid repetition. Petitioner Pedroni advanced the federalism argument on behalf of all parties in the district court. The argument was specifically incorporated by reference in Petitioner Pedroni's brief to the Third Circuit. Moreover, Pedroni joined in the petition for rehearing and rehearing *en banc*. Hence, Pedroni also joins

REASONS FOR GRANTING THE PETITION

This criminal tax case presents a question of exceptional importance that goes to the heart of our federal system of government. Here, Petitioners Karamanos and Pedroni were convicted of wire fraud (18 U.S.C. 1343) and conspiracy to commit wire fraud under 18 U.S.C. 371. The federal fraud alleged was the evasion of local and state excise taxes. The state tax offense was presented by the federal prosecutors in federal court. The power to raise revenue, levy local taxes, and enforce local tax laws is a basic element of the state's sovereignty, reserved to the states by our Constitution's federalism principles and the Tenth Amendment.

The decision below squarely conflicts with this Court's ruling in *Cleveland v. United States*, 531 U.S. 12 (2000). At issue in *Cleveland* was the Louisiana statutory scheme regulating casino licenses which was designed in part to raise revenues by levying "a fixed percentage of net revenue" and a series of other fees. *Id.* at 22. This Court ruled that the federal government could not enforce such state revenue raising statutes through the use of the federal fraud and conspiracy laws. After *Cleveland*, there is no constitutional justification for the decision below authorizing federal prosecutors to utilize the federal fraud and conspiracy statutes to prosecute state and local tax offenses.

In *United States v. Lopez*, 514 U.S. 549 (1995), this Court struck down a federal criminal statute prohibiting knowing possession of a firearm in a school zone. In so holding, the

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this petition with Karamanos. Pursuant to Rule 12.4, Pedroni has also filed a separate petition presenting questions that challenge the jury instructions relating to the conspiracy charges as addressed in the *Pedroni* case (No. 02-240). We therefore include that opinion of the court of appeals in the Appendix. (App. *infra*, 18a-29a) Since Petitioner Pedroni was convicted only on a single count of conspiracy, a reversal of his conviction on the ground raised in this petition will result in dismissal of the charge against him.

Court declared that the State's power to enforce its criminal laws is primary and paramount. *Id.* at 561 n. 3:

> Under our federal system, the "'States possess primary authority for defining and enforcing the criminal law.'" . . . [internal citations omitted] . . . ("Our national government is one of delegated powers alone. Under our federal system the administration of criminal justice rests with the States except as Congress, acting within the scope of those delegated powers, has created offenses against the United States"). When Congress criminalizes conduct already denounced as criminal by the States, it effects a "'change in the sensitive relation between federal and state criminal jurisdiction.'" [citation omitted]

Similarly, in *United States v. Morrison*, 529 U.S. 598 (2000), this Court struck down a statute to aid the victims of violence, holding that such a federal statute improperly infringed upon state statutes in areas traditionally regulated by the states. "The Constitution requires a distinction between what is truly national and what is truly local." 529 U.S. at 617-18.

Before *Lopez*, the circuits had regularly approved the federal prosecution of state and local tax offenses through the federal conspiracy and fraud statutes. E.g., *Porcelli v. United States*, 865 F.2d 1352 (2d Cir.), *cert. denied*, 493 U.S. 810 (1989) (sales taxes)[2]; *United States v. DeFiore*, 720 F.2d 757 (2d Cir. 1983) (scheme to defraud states of cigarette taxes); *United States v. Brewer*, 528 F.2d 492 (4th Cir. 1975); *United*

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[2] This decision drew sharp disagreement from Chief Judge Newman who dissented at 865 F.2d at 1367 stating: "Before tolerating such an extraordinary disparity between federal and state enforcement techniques, especially as to a matter so central to the prerogatives of states as the collection of their own taxes, courts should be scrupulous in making sure that the conduct punished under federal authority falls within the reach of federal statutes."

States v. Melvin, 544 F.2d 767 (5th Cir.), *cert. denied*, 430 U.S. 910 (1977); *United States v. Flaxman*, 495 F.2d 344 (7th Cir.), *cert. denied*, 419 U.S. 1031 (1974); *Hofstetter v. Fletcher*, 905 F.2d 897 (6th Cir. 1988); *Ginsberg v. United States*, 909 F.2d 982, 987 (7th Cir. 1990) (property taxes); *United States v. Mirabile*, 503 F.2d 165 (8th Cir. 1974).

After *Lopez*, a conflict in the circuits has developed as to whether the federal fraud and conspiracy statutes may be used to enforce another sovereign's tax laws. Compare *United States v. Boots*, 80 F.3d 580 (1st Cir. 1996) (reversing conviction), with *United States v. Trapilo*, 130 F.3d 547 (2d Cir. 1997) (upholding conviction). The Third Circuit in *Karamanos* has joined the Second Circuit despite the intervening decisions of this court in *Cleveland, Lopez* and *Morrison*. On the other hand, the First Circuit in *United States v. Boots*, 80 F.3d 580 (1st Cir. 1996) determined that the federal fraud and conspiracy statute should not be used to enforce another sovereign's tax laws. That same rationale equally applies to the local tax laws of the co-equal state sovereigns in our federalist system. Since this Court in *Morrison, supra*, affirmed the Fourth Circuit's opinion in *Brzonkala v. Virginia Polytechnic Institute and State University*, 169 F.3d 820 (4th Cir. 1999), the Fourth Circuit is no longer likely to adhere to its pre-*Lopez* decision in *United States v. Brewer, supra*. The splintering of decisions in the area demonstrates the need for guidance from this Court. Absent review by the Court, the district courts (as well as other appellate courts like the Third Circuit) are likely to continue to rely upon the pre-*Lopez* and pre-*Cleveland* authority.

Despite this Court's decisions in *Cleveland, Lopez* and *Morrison*, the Second Circuit and now the Third Circuit have upheld the federal prosecution of state, local and foreign tax offenses. Plenary review by this Court is therefore necessary to clarify the limitations upon the federal government in accordance with the dictates of the Constitution.

I. THE PARAMOUNT INTEREST OF THE STATES IN ENFORCING THEIR TAX LAWS

1. For more than a century, the jurisprudence of this Court has regarded taxation as a special power reserved to the States under the Tenth Amendment. In *Lane County v. Oregon*, 74 U.S. (7 Wall.) 101 (1869), this Court held that the power to levy and enforce taxes is one of those powers reserved to the States:

> Now, to the existence of the States, themselves, . . . the power of taxation is indispensable. It is an essential function of government. It was exercised by the Colonies; and when the Colonies became States, both before and after the formation of the Confederation, it was exercised by the new governments.

74 U.S. at 104. This view was reiterated in *Union Pacific R.R.Co. v. Peniston*, 85 U.S. 5 (1873), where the Court stated:

> That the taxing power of a state is one of its attributes of sovereignty; that it exists independently of the Constitution of the United States, and underived from that instrument; and that it may be exercised to an unlimited extent upon all property, trades, business, and avocations existing or carried on within the territorial boundaries of the State . . . And in thus acknowledging the extent of the power to tax belonging to the States, we have declared that it is indispensable to their continued existence. No one ever doubted that before the adoption of the Constitution of the United States each of the States possessed unlimited power to tax, either directly or indirectly, all persons and property within their jurisdiction. . .

85 U.S. at 29. *Accord, Nathan v. The State of Louisiana*, 73 U.S. (8 How.) 992 (1850).

This policy is also reflected in the Tax Injunction Act, 28 U.S.C. 1341, which expressly protects the States' power

of tax enforcement from federal intrusion. That statute provides that:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

This Court has noted that the Tax Injunction Act is rooted "in principles of federalism, and in recognition of the imperative need of a State to administer its own fiscal operations." *Tully v. Griffin, Inc.*, 429 U.S. 68, 73 (1976). Indeed, these same principles of federalism have prompted this Court to hold that the federal courts do not have jurisdiction to consider federal constitutional challenges to state taxes but that such cases must be brought in the state courts. *California v. Grace Brethren Church*, 457 U.S. 393, 413-415 (1982).

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S REFUSAL TO SANCTION FEDERAL INTRUSION INTO A STATE'S SOVEREIGN AFFAIRS.

2. The Constitutional invalidity of federal prosecution for state tax offenses is further evidenced by this Court's recent rulings overturning a federal intrusion upon the constitutional interests of individual states.[3] The use of the mail fraud statute to prosecute a local tax crime is just such an intrusion and "invades the province of State sovereignty reserved by the Tenth Amendment." *New York v. United States*, 505 U.S. 144, 155 (1992). Apart from the dictates of the Tenth Amendment, our federal system "reserves sovereignty" and

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[3] *E.g., Board of Trustees v. Garrett*, 531 U.S. 356 (2001); *Morrison, supra*, 529 U.S. 598; *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000); *Printz v. United States*, 521 U.S. 898 (1997); *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996); *United States v. Lopez, supra*, 514 U.S. 549 (1995); *New York v. United States*, 505 U.S. 144 (1992).

"the essential attribute inherent in that status" to the States. The States "form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere." *Alden v. Maine*, 527 U.S. 706, 714 (1999)(quoting from The Federalist No. 39, p. 245 (C. Rossiter ed. 1961) (J. Madison). Put another way, the States are supreme within their own spheres of authority. Surely, a State's ability to raise revenue for its sovereign operations lies within its exclusive sphere of authority.

As Justice Kennedy wrote for the Court in *Alden v. Maine*, 527 U.S. 706 at 753 (1999),

> By split[ting] the atom of sovereignty, the Founders established "two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it." *Saenz v. Roe*, 526 U.S. 489, 504, n.17, 119 S.Ct. 1518, 143 L.Ed.2d 689 (1999), quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838, 115 S.Ct. 1842, 131 L.Ed.2d 881 (1995) (Kennedy, J., concurring) "The Constitution thus contemplates that a State's government will represent and remain accountable to its own citizens." Printz, 521 U.S. at 920, 117 S.Ct. 2365. *When the Federal Government asserts authority over a State's most fundamental political processes, it strikes at the heart of the political accountability so essential to our liberty and republican form of government. . . A State is entitled to order the processes of its own governance*, assigning to the political branches, rather than the courts, the responsibility for directing the payment of debts. (emphasis added)

When the federal government deigns to enforce a state's tax laws through the federal system it similarly asserts authority over the states' most fundamental processes. In *Fed.*

Maritime Com'n v. S. C. State Ports Auth., ___ U.S. ___, 122 S.Ct. 1864, 1870 (2002), Justice Thomas observed for the Court:

> Dual sovereignty is a defining feature of our Nation's constitutional blueprint. See *Gregory v. Ashcroft*, 501 U.S. 452, 457, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991). States, upon ratification of the Constitution, did not consent to become mere appendages of the Federal Government. Rather, they entered the Union "with their sovereignty intact." *Blatchford v. Native Village Noatak*, 501 U.S. 775, 779, 111 S.Ct. 2578, 115 L.Ed.2d 686 (1991).

In *Printz v. United States*, 521 U.S. 898 (1997) this Court held that state officers could not be commandeered to enforce federal programs. Justice Scalia's opinion for the Court stated as follows:

> It is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority. See *Texas v. White*, 7 Wall at 725. *It is no more compatible with this independence and autonomy that their officers be "dragooned" . . . into administering federal law than it would be compatible with the independence and autonomy of the United States that its officers be impressed into service for the execution of state laws.* (emphasis added) (internal citations omitted)

521 U.S. at 928. By the same token, the use of federal prosecutors and federal courts to enforce a system of state tax laws would be similarly incompatible with our federalist system.

Our federalism principles protect a state's sovereign integrity and most importantly, the integrity of its treasury. *Alden, supra*, 527 U.S. at 748-751. In the present case, the federal executive assumed enforcement of a local excise tax code in the federal courts and the federal government received 100%

of the fines and restitution as levied against the defendant Pedroni. (App., *infra*, 16a) It is an affront to a state's sovereignty to have its sovereign laws enforced in federal courts in ways at variance with the laws as written. Moreover, to have its financial right to those tax benefits usurped by the federal sovereign is an equal affront to the state's sovereignty. (527 U.S. at 748-751)

Such an event places an "unwarranted strain on the States' ability to govern in accordance with the will of [its] citizens." (527 U.S. at 750) In *College Savings Bank v. Florida Prepaid Post Secondary*, 527 U.S. 666, 682 (2001), this Court made it clear that a state's sovereignty, as preserved in our Constitution, is of equal status to all other constitutional rights. A State's sovereign rights may not be involuntarily waived, changed or abrogated by an Act of Congress. 527 U.S. at 682.

III. CONGRESS HAS NOT AUTHORIZED THE SIGNIFICANT FEDERAL INTRUSION INTO THE STATE'S *SOVEREIGNTY EVIDENCED* BY THIS CASE.

3. In *Cleveland, supra*, this Court noted that Louisiana had "unambiguous criminal statutes" for protecting its casino licensing program. (531 U.S. at 24) New Jersey also has such unambiguous criminal statutes for its tax program. The distinct difference between a state prosecution and a federal prosecution in this case produces markedly disparate results. Had the defendants been prosecuted by New Jersey for a conspiracy to evade the state excise taxes, they would have been only liable for the commission of a disorderly persons offense. N.J.S.A. 54:52-1. There is a presumption of non-incarceration for all third-degree and fourth-degree offenses in New Jersey. N.J.S.A. 2C:44-1e. Disorderly persons offenses such as N.J.S.A. 54:52-1 are even less serious.

The prosecution of these state offenses as serious federal felonies blurs, indeed obliterates, the distinction between

what is truly national and what is truly local authority. *United States v. Morrison, supra*, 529 U.S. at 617-18. The restitution ordered and the fines imposed eloquently demonstrate the abrogation of the state's authority engendered by the federal prosecutions in these cases. Petitioner Pedroni was convicted only of conspiracy to commit the state tax offenses (among other objects). But instead of ordering any portion of the fines and restitution to be paid to New Jersey, the trial court ordered the fees and restitution to be paid to the Internal Revenue Service and the United States Treasury.

The practical and punitive consequence of these federal prosecutions contrast dramatically with the consequences imposed by the State of New Jersey for violation of its excise taxes. The defendants face five years imprisonment under 18 U.S.C. 371; five years imprisonment under each alleged wire fraud violation; and ten years imprisonment for each money-laundering charge (each money-laundering charge was predicated on the state excise tax charges). Petitioners Karamanos and Pedroni have been subjected to 11-year and 37-month sentences (respectively) in federal penitentiaries, whereas probationary sentences would have been the sentence if this matter were pursued in the state courts in New Jersey.[4] Moreover, instead of a fine and restitution payable to

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[4] A far less significant disparity prompted Justice Stevens to emphasize his concern in a separate concurring opinion in this Court's unanimous decision in *Jones v. United States*, 529 U.S. 848 (2000). There, he stated: "The fact that petitioner received a sentence of 35 years in prison when the maximum penalty for the comparable state offense was only 10 years . . . illustrates how a criminal law like this may effectively displace a policy choice made by the State. Even when Congress has undoubted power to preempt local law, we have wisely decided that 'unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance.' *United States v. Bass*, 401 U.S. 336, 349 (1971). For this reason, I reiterate my firm belief that we should interpret narrowly federal criminal laws that overlap with state authority unless congressional intention to assert its jurisdiction is plain." 529 U.S. at 859.

the state, the federal court ordered payments only to the United States Treasury. The disparity between the parameters of state enforcement and the federal transformation of the impact of these laws in this federal case, standing alone, represents a dramatic intrusion of federal prosecutorial objectives into what unquestionably should be a State system of tax enforcement.

While the States have a preeminent interest in enforcing the criminal provisions of their own tax laws, Congress has never identified any federal interest in prosecuting local excise tax violations when it enacted the mail and wire fraud statutes or when it amended them in 1988. In *Cleveland v. United States, supra*, which the decision below failed to consider, this Court unanimously reversed a federal mail fraud conviction of a defendant who mailed a false application for a state video poker license. Absent a clear statement by Congress, the Court rejected the federal government's use of the fraud statutes to enforce Louisiana's casino and revenue raising laws holding as follows:

> We resist the Government's reading of § 1341 as well because it invites us to approve a sweeping expansion of federal criminal jurisdiction *in the absence of a clear statement by Congress*. Equating issuance of licenses or permits with deprivation of property would subject to federal mail fraud prosecution a wide range of conduct traditionally regulated by state and local authorities. We note in this regard that Louisiana's video poker statute typically and unambiguously imposes criminal penalties for making false statements on license applications. [Emphasis added]

531 U.S. at 24.

This Court's decision in *Cleveland* recognizes that under our system of federalism, state and local tax laws should not be enforced through federal fraud and conspiracy prosecutions. The Constitution prohibits the infringement of

rights reserved to the States. Revenue raising is one of those reserved powers and is a power peculiarly within the States' domain. The system of federalism that the Constitution established is firmly based upon separate federal and state sovereign powers of governance. It was, as the Court has recently declared, "adopted by the Framers to insure the protection of our fundamental liberties." *Federal Maritime Commission v. South Carolina State Ports Authority*, *supra*, ___ U.S. ___, 122 S.Ct. 1864, 1879, No. 01-46, (2002). Indeed, this division of authority between the federal government and the States has been reaffirmed by both this Court and the courts of appeals in a number of decisions.

3. (a) Wholly apart from the constitutional defects in the wire fraud and conspiracy convictions, we also submit that federal prosecutors cannot arrogate to themselves the authority to enforce state tax laws by expanding the reach of the wire fraud statute to charge state tax evasion without running afoul of this Court's decisions in *Jones v. United States*, 529 U.S. 848 (2000) and *McNally v. United States*, 483 U.S. 350 (1987). "Any constitutionally doubtful construction should be avoided where possible." *Jones, supra*, at 851. Congress never evidenced an intent to authorize the federal fraud and conspiracy statutes to incorporate state criminal excise tax statutes;[5] therefore, such an interpretation

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[5] The authorities upon which the decision below relied (App., *infra*, 4a), do not undermine our submission that the defendant's wire fraud convictions for state tax violations violates the Tenth Amendment and our Constitution's federalist principles. Contrary to the court of appeals' observation, the fact that Congress may constitutionally regulate interstate commerce, as *Morrison* acknowledged, begs the question insofar as it fails to address the critical issue as to whether Congress intended the federal wire fraud statute (18 U.S.C. 1343) to authorize federal prosecutions of purely local state tax violations. Thus, there was no necessity for the Court in *Cleveland* to engage in the Commerce Clause analysis that it undertook in *Morrison*, *Jones*, or *Lopez*. Nor is it necessary in this case.

should be avoided. When Congress wanted to authorize the federal government to prosecute specific state crimes as federal offenses, it knew how to do so. In 18 U.S.C. 1952 and 1961, it did so by specifically identifying them. In 1988, Congress expanded the coverage of the criminal mail and wire fraud statutes by enacting 18 U.S.C. 1346. However, even in the 1988 legislation, Congress did not express any intent to enforce state and local tax laws.

As Justice Rehnquist observed for the Court in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 16 (1981), when a federal statute "intrudes on traditional state authority" courts should not attribute "an unstated intent to act" to Congress. In *Gregory v. Ashcroft*, 501 U.S. 452, 460-461 (1991), the application of a provision of the federal Age Discrimination in Employment Act was invalidated insofar as it applied to state specified qualifications for judges (including age). Such a decision is "fundamental" "for a sovereign entity" *Id.* at 460. A state's revenue raising and statutory enforcement scheme is equally fundamental. This Court, in an opinion by Justice O'Connor, required in *Gregory* the clearest congressional intent before a statute was construed to intrude on an area of traditional state control and sovereignty (id.):

> This provision goes beyond an area traditionally regulated by the States; it is a decision of the most fundamental sort for a sovereign entity. Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign.
>
> * * *
>
> For this reason, "it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides" this balance. *Atascadero, supra*, 473 U.S., at 243, 105 S.Ct., at 3147. We explained recently:

> "[I]f Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.' *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 [105 S.Ct. 3142, 3147, 87 L.Ed.2d 171] (1985).

The 1988 legislative history accompanying the amendments to the mail and wire fraud statutes is consistent with Judge Weinfeld's decision in *United States v. Henderson*, 386 F.Supp. 1048 (S.D.N.Y. 1974). There, the court held that the mail fraud statute was not intended to reach cases of alleged tax evasion, noting that the mail fraud statute was enacted before both federal and state income tax laws and therefore, it is "a fiction" to assume "Congress intended the mail fraud statute to apply" to such tax cases. *Id.* at 1052. Congress has never sought to overrule this ruling by Judge Weinfeld as it has done with respect to the issues covered by 18 U.S.C. 1346. Moreover, the Department of Justice has acknowledged the correctness of the reasoning in *Henderson*. Section 6-4.211(1) of the U.S. Department of Justice Manual provides:

> It is the position of the Tax Division [of the Department of Justice] that Congress intended that tax crimes be charged as tax crimes and that the specific criminal law provisions of the Internal Revenue Code should form the focus of prosecution when essentially tax law violation motives are involved, even though other crimes may technically have been committed [citing *Henderson*].

The same policy should exist as to the use of such statutes to prosecute state and local tax offenses. If that was the policy federal prosecutors would not utilize these general federal criminal statutes to prosecute local tax offenses. *Cf. United States v. Minarik*, 875 F.2d 1186, 1193-94 (6th Cir. 1989), where the court held that the use of the Title 18 Conspiracy "to defraud" part of Section 371, in order to charge tax violations was defective as a matter of law.

(b) Viewed in this light, Petitioners Pedroni's and Karamanos' convictions for conspiracy are likewise defective insofar as one of the objects was to commit wire fraud on the State of New Jersey. The presence of this defective object in the conspiracy count necessarily invalidates their conspiracy convictions because it cannot be determined upon which object of the conspiracy the jury reached its verdicts. This analysis finds solid support in *Yates v. United States*, 354 U.S. 298 (1957). There, the Court held that a conviction under a single-count federal indictment charging a conspiracy with two objects, one of which was insufficient as a matter of law, must be reversed. The Court found the second object of the conspiracy, *i.e.*, organizing the Communist Party, to be legally insufficient. As a result, it reversed the general verdict of the defendant's conviction because it was impossible to tell which ground the jury selected.

"[W]here a provision of the Constitution forbids conviction on a particular ground, the constitutional guarantee is violated by a general verdict that may have rested on that ground." *Griffin v. United States*, 502 U.S. 46, 53 (1991) Accord, *Williams v. North Carolina*, 317 U.S. 287, 291-292 (1942); *Cramer v. United States*, 325 U.S. 1 (1945). The rationale for this longstanding rule was recently summarized and upheld by the Court in *Griffin* (502 U.S. at 59):[6]

> Jurors are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law—whether, for example, the action in question is protected by the Constitution, is time barred, or fails to come within the statutory definition of the crime. When, therefore, jurors have been left the option

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[6] In *Griffin, supra*, the Court held that a general verdict of conviction in a multi-object conspiracy could not be set aside where the challenge to one of the objects was on the sufficiency of the evidence. Unlike a claim of legal invalidity, jurors are equipped to judge the adequacy of the evidence. *Turner v. United States*, 396 U.S. 398 (1970).

> of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error.

Accord, United States v. Self, 2 F.3d 1071, 1092-1094 (10th Cir. 1993). Here, Petitioners' convictions rest upon a legal theory that cannot stand under the Constitution's Tenth Amendment. That constitutional defect calls for plenary review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 28, 2002

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 00-5212

UNITED STATES OF AMERICA,

v.

DEMETROIS KARAMANOS,
Appellant.

(D.C. Crim. No, 95-cr-00388-4)

SUR PETITION FOR REHEARING

Present: BECKER, *Chief Judge,* SLOVITER, SCIRICA, NYGAARD, ALITO, ROTH, MCKEE, RENDELL, BARRY, AMBRO, FUENTES, and COWEN*, *Circuit Judges* and RESTANI**, United States Court of International Trade

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in

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* As to panel rehearing only.

** The Honorable Jane A. Restani, Judge, United States Court of International Trade, who sat by designation, as to panel rehearing only.

regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

/s/ [illegible]
Circuit Judge

Jun 4, 2002

APPENDIX B

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT

[Filed April 18, 2002]

No. 99-5212
Argued March 7, 2002

UNITED STATES OF AMERICA,

v.

DEMETRIOS KARAMANOS,
Appellant.

Before SCIRICA and COWEN, *Circuit Judges*, RESTANI*, United States Court of International Trade.

OPINION

COWEN, *Circuit Judge.*

Presented for our review is one of four companion cases involving a lengthy trial before the District Court after which defendants were convicted of various federal crimes arising out of a so-called "daisy chain" scheme to avoid paying federal and New Jersey state fuel taxes. The elements of such schemes have been detailed sufficiently elsewhere by this Court. *See, e.g., United States v. Morelli,* 169 F.3d 798, 801 (3d Cir.1999), *cert. denied*, 528 U.S. 820, 120 S.Ct. 63, 145 L.Ed.2d 54 (1999) (citations omitted). We will add factual detail below as it becomes necessary to the alleged point of error.

Demetrios Karamanos was convicted of: (1) conspiracy (18 U.S.C. § 371) to defraud the United States, to commit tax

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* Honorable Jane A. Restani, Judge, United States Court of International Trade, sitting by designation.

evasion (26 U.S.C. § 7201), to commit wire fraud (18 U.S.C. § 1343), and to commit money laundering (18 U.S.C. § 1957); (2) eleven counts of attempting to evade excise taxes (26 U.S.C. § 7201); (3) five counts of wire fraud (18 U.S.C. § 1343); and (4) two counts of money laundering (18 U.S.C. § 1957). The District Court sentenced Karamanos to 135 months of incarceration and ordered a special assessment of $950. He appeals, alleging numerous substantive errors relating to his convictions and numerous errors in his sentencing as well. After a thorough review of the parties' submissions and the decisions of the District Court, we will affirm.

I.

Karamanos posits that his convictions based on the federal crime of wire fraud (18 U.S.C. § 1343) cannot stand because the application of that statute in the present case violates the theory of federalism and the principles of the 10th Amendment to the United States Constitution. We do not agree. Karamanos' federalism arguments are eloquently presented but are substantively wide of the mark. The United States Supreme Court has consistently maintained that Congress may constitutionally regulate the "channels" and "instrumentalities" of interstate commerce. *See United States v. Morrison*, 529 U.S. 598, 609, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000). The wire fraud statute, as applied in this case, is in harmony with these Commerce Clause principles. Cases rejecting the theory underlying Karamanos' federalism argument are manifold. *See, e.g., United States v. Panarella,* 277 F.3d 678, 693-94 (3d Cir.2002); *United States v. Porcelli,* 865 F.2d 1352, 1358 (2d Cir.1989); *United States v. Mirabile,* 503 F.2d 1065, 1066- 67 (8th Cir.1974); *see also Parr v. United States,* 363 U.S. 370, 389, 80 S.Ct. 1171, 4 L.Ed.2d 1277 (1960). We conclude that the use of the wire fraud statute to prosecute Karamanos did not offend Constitutional principles regarding the proper division of powers between the individual states (such as New Jersey) and the federal government.

Karamanos argues that the scheme to defraud did not deprive the State of New Jersey out of any property. We are not persuaded. New Jersey was clearly deprived of property for purposes of the wire fraud statute by the scheme to defraud. The scheme was designed to cheat the State of New Jersey out of tax money that was duly owed under New Jersey tax law. *See Porcelli*, 865 F.2d at 1359-61; *see also United States v. Helmsley*, 941 F.2d 71, 94 (2d Cir.1991). In a very real, clear, and palpable sense, New Jersey was deprived of money or property.

Karamanos further contends that on the facts presented, there was no use of wire fraud "proceeds" for purposes of establishing the money laundering crimes. We note that Karamanos has waived this argument since he did not properly preserve it at the District Court. Moreover, we will not entertain his argument on this point because it suffers from a dispositive procedural infirmity: his argument regarding "proceeds" is based on his assertion that a prior opinion of this Court, *Morelli*, 169 F.3d 798, was wrongly decided. Karamanos requests in his brief that we "revisit" our opinion in *Morelli*. This we cannot do. Our Internal Operating Procedure does not permit one three-Judge panel to overrule the decision of another three-Judge panel. To overrule a prior panel, the matter must be brought before the Court sitting en banc. Karamanos has not formally requested an en banc hearing on this issue nor, in our view, has he presented adequate grounds for overturning the legal principles established in *Morelli*. We note that Karamanos has not cited any contrary authority to suggest that *Morelli* is inconsistent with precedent of this Court or of the Supreme Court.

Karamanos next argues that there was insufficient evidence to find him guilty of money laundering. We review this claim based on whether any rational factfinder could find the elements of the offense beyond reasonable doubt. *United States v.*

Veksler, 62 F.3d 544, 551 (3d Cir.1995) (citations omitted). We find this argument conclusory in nature and despite a voluminous record, Karamanos does not point us to any specific parts of the record that support his assertion. In any event, as further explained in Section II infra, the record amply demonstrates to a reasonable factfinder that Karamanos was either personally involved in the money laundering or could reasonably foresee that his coconspirators would engage in the money laundering conduct.

II.

Karamanos next attacks several aspects of his sentencing. Our review of the District Court's interpretation and application of the federal sentencing guidelines is a question of law subject to plenary review. *United States v. Cherry*, 10 F.3d 1003, 1009 (3d Cir.1993). Pure issues of fact are reviewed for clear error. *Id.* Karamanos asserts that the District Court erred in giving him a two-level upward adjustment for the use of "sophisticated means" to prevent the government from finding out about the existence or extent of the crime. This argument is without merit. The record indicates that Karamanos was substantially involved in the creation, function and maintenance of the "daisy chain," which we view as an elaborate, complex, and sophisticated scheme devised to avoid payment of millions of dollars in taxes. The daisy chain included the use of numerous sophisticated devices to keep the scheme successfully rolling and to avoid detection by authorities. This included, inter alia, the use of sham companies, offshore accounts, phony invoices, and stolen or improperly obtained tax ("637") licenses. The record before us is more than adequate to support an increase for sophisticated means. See U.S.S.G. § 2T1.1, comment. (n. 4).

Karamanos posits that the District Court erred by giving him three-level upward adjustments for his role as a "manager or supervisor" (as opposed to a role as an "organizer or leader"). *See* Defendant's Brief at 53-56. Again, we are not persuaded. The record demonstrates that Karamanos more than earned these

adjustments through his substantial managerial role in the functioning and maintenance of the daisy chain scheme. For example, Karamanos gave orders to an employee and instructed an employee in the preparation of invoices for companies in the daisy chain. He also gave instructions on wiring money through the links of the chain itself, i.e., where to wire the money. Based on our review of the record, the District Court was correct to note that Karamanos played a supervisory or managerial role in the actual day-to-day operation of the fraudulent scheme. See U.S.S.G. § 3B1.1, comment. (n. 2). There was no error in this aspect of his sentencing.

Karamanos argues that the District Court erred in figuring the amount of New Jersey's tax loss that may be attributed to him individually. According to his theory, he should only be accountable for $185,000, representing the amount contained by his two convictions for money laundering. Anything more, Karamanos asserts, would be contrary to the Jury's verdict in this case. We are not convinced. The District Court properly determined that Karamanos was liable for the total amount of the loss caused by the fraud on the State of New Jersey. Contrary to Karamanos' position, acquitted conduct may be utilized in sentencing. The record demonstrates he played an integral role in the functioning of a scheme that caused an $11 million loss to the State of New Jersey. He was involved with all of the fuel that was funneled through the links in the chain, and, in any event, the actions of his coconspirators in evading New Jersey taxes were reasonably foreseeable. *See* U.S.S.G. § 1B1.3(a)(1)(B); *United States v. Ramos*, 147 F.3d 281, 286 (3d Cir.1998). Accordingly, we will not disturb the District Court's conclusion that the total New Jersey tax loss may be attributed to him. Karamanos argues that his conduct fell outside the "heartland" of money laundering, and, therefore, the District Court erred by using the money laundering guideline in calculating his sentence. He asserts that the District Court should have used the tax evasion guideline instead of the money laundering guideline. We do not agree.

As mentioned above, the record demonstrates that Karamanos was involved in an elaborate, systematic scheme to defraud. Money derived from the scheme was used to keep the daisy chain going and the links in the chain were set up to avoid detection by authorities. *See Morelli*, 169 F.3d at 805-809. This amounted to a crime of significant duration and marked severity. The total loss to the State of New Jersey on account of the daisy chain scheme was over 11 million dollars. The daisy chain constitutes serious criminal activity and is the type of conduct that Congress sought to prevent when it proscribed money laundering. There was nothing "atypical" about Karamanos' conduct that would have justified the District Court in not using the money laundering guideline. The District Court made the proper selection. *See United States v. Chilingirian*, 280 F.3d 704, 713-14 (6th Cir.2002).

III.

We have thoroughly reviewed all the arguments presented by Karamanos in his submissions to this Court, and those presented at oral arguments, and find no basis to disturb the multiple convictions or the sentence imposed by the District Court. The Judgment of Conviction entered on March 16, 1999 will be affirmed.

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT

No. 99-5212
Argued March 7, 2002

UNITED STATES OF AMERICA,

v.

DEMETRIOS KARAMANOS,

Appellant.

JUDGMENT

Before SCIRICA and COWEN, *Circuit Judges*, RESTANI *, United States Court of International Trade.

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued on March 7, 2002. On consideration whereof, it is now here ordered and adjudged that the judgment of the District Court entered on March 16, 1999, be and the same hereby is affirmed. All of the above in accordance with the opinion of this court.

ATTEST:-

/s/ [illegible]

Clerk

Dated: Apr 18, 2002

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* Honorable Jane A. Restani, Judge, United States Court of International Trade, sitting by designation.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

[Filed March 8, 1999]

Case Number 95-388-05(JEI)

UNITED STATES OF AMERICA,

v.

RICHARD PEDRONI,

Defendant.

JUDGMENT IN A CRIMINAL CASE

(For Offenses Committed On or After November 1, 1987)

The defendant, RICHARD PEDRONI, was represented by James Plaisted Esq., Justin Walder Esq. & Christopher Ferrella Esq..

The defendant has been found not guilty on count(s) 14, 15, 20 thru 26, 28, 29, 31, 32, 33 and is discharged as to such count(s).

The defendant was found guilty on count(s) one by a jury verdict on 6119198 after a plea of not guilty. Accordingly, the defendant is adjudged guilty of such count(s), involving the following offense(s):

Title & Section	Nature of Offense	Date of Offense	Count Number(s)
18 USC 371	Conspiracy to Commit Wire Fraud, Money Laundering and Excise Tax Evasion	2/17/89 thru 8/3/95	1

As pronounced on 3/4/99, the defendant is sentenced as provided in pages 2 through 6 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $50.00, of count(s) one, which shall be due immediately. Said special assessment shall be made payable to the Clerk, U.S. District Court.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this the 8th day of March,1999.

/s/ Joseph E. Irenas
United States District Judge

* * * *

Defendant: RICHARD PEDRONI JUDGMENT—PAGE 2 OF 6
Case Number: 95-388-05(JEI)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 37 Months.

The Court makes the following recommendations to the Bureau of Prisons: The Court recommends the defendant participate in the Inmate Financial Responsibility Program.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons as directed by the probation office. Upon motion of the defendant, the court has continued the defendant's release on bail pending appeal. Ordered defendant's bail continued. Ordered the defendant

shall surrender for service of sentence at the institution designated by the Bureau of Prisons as directed by the Probation Office at the earlier of (i) completion of the defendant's appeal, if the conviction and sentence are upheld, or (ii) revocation of bail.

* * * *

Defendant: RICHARD PEDRONI JUDGMENT—PAGE 3 OF 6
Case Number: 95-388-05(JEI)

RETURN

I have executed this Judgment as follows:____

Defendant delivered on____to____, with a certified copy of this Judgment.

_____
United States Marshall

* * * *

Defendant: RICHARD PEDRONI JUDGMENT—PAGE 3 OF 6
Case Number: 95-388-05(JEI)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of 3 years.

While on supervised release, the defendant shall comply with the standard conditions that have been adopted by this court (set forth below):

> Based on information presented, the defendant is excused from the mandatory drug testing provision, however, may be requested to submit to drug testing during the period of supervision if the probation officer determines a risk of substance abuse.

If ordered to the custody of the Bureau of Prisons, the defendant shall report in person to the probation office in which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

If this judgment imposes a fine, special assessment, costs, or restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine, assessments, costs, and restitution that remains unpaid at the commencement of the term of supervised release.

and shall comply with the following additional conditions:

The defendant shall provide the U.S. Probation Office with full disclosure of his financial records to include yearly income tax returns upon the request of the U.S. Probation Office. The defendant shall cooperate with the probation officer in the investigation of his financial dealings and shall provide truthful monthly statements of his income.

The defendant is to fully cooperate with the Internal Revenue Service by filing all delinquent or amended returns within six months of the sentence date and to timely file all future returns that come due during the period of probation. The defendant is to properly report all correct taxable income and claim only allowable expenses on those returns. The defendant is to provide all appropriate documentation in support of said returns. Upon request, the defendant is to furnish the Internal Revenue Service with information pertaining to all assets and liabilities, and the defendant is to fully cooperate by paying all taxes, interest and penalties due, and otherwise comply with the tax laws of the United States.

* * * *

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

1) The defendant shall not commit another federal, state, or local crime during the term of supervision.

2) The defendant shall not illegally possess a controlled substance.

3) If convicted of a felony offense, the defendant shall not possess a firearm or destructive device.

4) The defendant shall not leave the judicial district without the permission of the court or probation officer.

5) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.

6) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

7) The defendant shall support his or her dependents and meet other family responsibilities.

8) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.

9) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.

10) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances.

11) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

12) The defendant shall not associate with any persons engaged in criminal-activity and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

13) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.

14) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

15) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

16) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

* * * * *

Defendant: RICHARD PEDRONI JUDGMENT—PAGE 5 OF 6
Case Number: 95-388-05(JEI)

RESTITUTION AND FORFEITURE RESTITUTION

The defendant shall make restitution to the following persons in the following amounts:

Name of Payee	Amount of Restitution
Internal Revenue Service CIB Brookhaven Service Center PO Box 900 Holtsville, NY 11742	$500,000.00

Payments of restitution are to be made as directed by the probation office.

Restitution, plus any interest pursuant to 18 USC § 3612(f)(1), shall be due and payable immediately, and the defendant shall pay $338,000.00 toward the total amount due within 6 months of the sentence date. Upon release from imprisonment the defendant shall pay $4,500.00 a month, to satisfy the balance of $162,000.00 during the three year term of supervised release. The defendant's restitution obligation shall not be affected by any restitution payments made by other defendants in this case.

* * * *

Defendant: RICHARD PEDRONI JUDGMENT—PAGE 6 OF 6
Case Number: 95-388-05(JEI)

STATEMENT OF REASONS

The court adopts the factual findings and guideline application in the presentence report except: The Court finds the Federal Tax loss in the Tax Group was $9,480,702. This results in a one level reduction in the offense level for the Tax Group. Due to the aperation of USSG 3D4.1, the total offense level for both groups remains the same.

Guideline Range Determined by the Court:

Total Offense Level:	26
Criminal History Category:	I
Imprisonment Range:	60 months to 60 months.
Supervised Release Range:	2 to 3 years
Fine Range:	$12,500 to $125,000
Restitution:	$500,000.00

The fine is waived because of the defendant's inability to pay.

The sentence departs from the guideline range for the following reason(s): The Court believes there are two factors that take this case out of the heartland of cases under USSG 5K2.C and cause the guidelines to overstate the seriousness of defendant's conduct:

1. No record that the defendant received any of the illegal gain from the offense; and

2. The activity of the defendant was, on its face, legal; i.e., selling fuel oil at market price. The conspirators had no problem finding a replacement supply of oil on the same terms and conditions. By contrast, finding or replacing bum and insulating companies was a more difficult task.

The Court departs downward (i) on the tax group by five (5) levels, to an adjusted Offense Level of 17, and (ii) by five (5) levels, to an adjusted Offense Level of 19. The Total Offense Level after departure, and operation of U.S.S.G. 3D1.3.4 is 21.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

[Filed April 18, 2002]

No. 99-5182

UNITED STATES OF AMERICA

v.

RICHARD PEDRONI,

Appellant.

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Criminal No. 95-cr-00388-5)
District Judge: Hon. Joseph E. Irenas

Argued March 7, 2002

Before: SCIRICA and COWEN, *Circuit Judges*, RESTANI*, *Judge*, United States Court of International Trade

OPINION

COWEN, *Circuit Judge*

Richard Pedroni was found guilty of violating 18 U.S.C. § 371 by conspiring to defraud the United States, and to commit tax evasion (in violation of 26 U.S.C. § 7201), wire fraud on the State of New Jersey (in violation of 18 U.S.C. § 1343), and money laundering (in violation of 18 U.S.C.

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* Honorable Jane A. Restani, Judge, United States Court of International Trade, sitting by designation.

§ 1957). He was acquitted on all other counts. The District Court sentenced Pedroni to 37 months and ordered him to pay $500,000 in restitution. He challenges the sufficiency of the evidence to support his conviction, some of the evidentiary rulings and jury instructions, as well as his sentence. We will affirm.[1]

I.

Pedroni and his coconspirators participated in a "daisy chain" scheme to evade excise taxes on the sale of certain kinds of fuel. The elements of such schemes have been detailed sufficiently elsewhere. *See, e.g., United States v. Morelli*, 169 F.3d 798, 801 (3d Cir.1999), cert. denied, 528 U.S. 820,120 S.Ct. 63 (1999) (citations omitted). From 1989 until at least 1993, Pedroni operated as the president of Pedroni Fuels, a fuel supply company operating at the top of the daisy chain. We will add further factual detail below as it becomes necessary to the legal discussion.

II.

A. Sufficiency of the Evidence

Pedroni first challenges the sufficiency of the evidence to support his conviction. When reviewing the sufficiency of the evidence to sustain a conviction, we must ask whether any rational jury could have found the essential elements of the offense beyond a reasonable doubt, viewing the evidence in the light most favorable to the government. *See United States*

[1] Currently before this Court are four appeals arising from the same trial, of which Pedroni's appeal is one. *See United States v. Enright*, No. 99-5144; *United States v. Pedroni*, 99-5182; *United States v. Karamanos*, No. 99-5212; *United States v. Erlikh*, No. 99-5281. We granted counsel leave to file oversized briefs and ordered that there be no repetition of issues in the briefs. To the extent issues in this Memorandum Opinion apply to any or all of the other three Appellants in this case, we deem the Appellants' arguments to be without merit and affirm the Appellants' convictions and sentences.

v. Veksler, 62 F.3d 544, 551 (3d Cir.1995) (citations omitted). Count One of the Superseding Indictment charged the conspirators with a multiple-object conspiracy to defraud the United States and to commit tax evasion, wire fraud on the State of New Jersey, and money laundering. The Government was required to prove three elements: "(1) the existence of an agreement, (2) an overt act by one of the conspirators in furtherance of the objectives, and (3) an intent on the part of the conspirators to agree, as well as to defraud the United States" or to commit an underlying offense, 608 F.2d 950, 955-56 (3d Cir.1979). Pedroni challenges the sufficiency of the first and third elements, arguing that he had no actual knowledge of the illegal objective of the conspiracy nor the requisite intent required.

We are satisfied that a rational finder of fact could conclude beyond a reasonable doubt that the Government met its burden of proof. A jury could rationally infer that Pedroni had actual knowledge of the conspiracy, and that he intended that excise taxes would not be paid on the fuel Pedroni supplied to the daisy chain. For example, Pedroni stock-transferred fuel into Petro Plus' account at the terminal despite invoicing the fuel to a middle company in the chain. He called Kings to determine which company to invoice for the fuel, and it was Kings (and not Petro Plus) that paid Pedroni for the fuel before Pedroni even sent invoices for the middle companies to Kings. When documents and certification were lacking, Pedroni called personnel at Kings, instead of calling the actual purchaser, to give that particular purchasing company an opportunity to provide correct documentation. It did not matter that Pedroni sold to middle companies in the daisy chain that had 637 Licenses (making the initial transactions tax-exempt) because Pedroni clearly knew that he was in effect selling to PetroPlus and that taxes were not being payed along the chain. The record reflects numerous examples of similar deceptions. It is apparent from

the record that the trial provided sufficient evidence from which a rational jury could find the essential elements of the offense beyond a reasonable doubt.

B. Jury Instructions

Pedroni argues that the District Court erred when it did not deliver a charge which included instructions on good-faith defense, willfulness, multiple conspiracy, missing witness, and unity of purpose instructions. Additional error is alleged because the District Court did not instruct the jury that each element must be found unanimously and advised the jury to disregard the evidence that Pedroni lacked a stake in the venture. "We will reverse the [D]istrict [C]ourt's denial to charge a specific jury instruction only when the requested instruction was correct, not substantially covered by the instructions given, and was so consequential that the refusal to give the instruction was prejudicial to the defendant." *United States v. Phillips*, 959 F.2d 1187, 1191 (3d Cir.1992). In determining whether the District Court stated the appropriate legal standards in its charge, our review is plenary. *United States v. Johnstone*, 107 F.3d 200, 204 (3d Cir. 1997). The jury charge must clearly articulate the legal standards at issue and be structured to avoid confusion, we examine the charge in its entirety. *Id.*

We have previously made clear that a District Court's failure to give a good-faith defense instruction does not constitute an abuse of discretion, so long as the charge included detailed instructions on the elements of the crime. *Gross*, 961 F.2d at 1103 ("[A] jury finding of good faith is inconsistent with a finding that the defendant acted knowingly and willfully."). Consistent, with our practice to review the entire jury charge as a whole, the record is clear that the District Court adequately charged the jury on willfulness. It was not in error to refuse to charge the defense of good faith.

As to the failure to charge on multiple conspiracies, the District Court did instruct the jury that the "first element for you to determine is whether the conspiracy charged in Count One existed" and that "[i]n order to find a defendant guilty of conspiring to defraud the United States, you must find that he was a participant in the scheme to defraud the United States set forth in the Indictment, and not some other scheme." App. at 627, 630. The District Court further instructed the jury that it could not consider whether a defendant was a member of the conspiracy unless it found that "the evidence shows that the conspiracy charged in Count One existed." App. at 633. The charge, viewed in its entirety, substantially covered the instruction Pedroni argues should have been included. *See, e.g.*, Phillips, 959 F.2d at 1191.

Pedroni argues that the District Court should have given a missing witness instruction because the government chose not to call three of its cooperating witnesses. It is clearly established precedent in this Circuit that a missing witness instruction is not appropriate when the witness is available to both the defense and the prosecution. *United States v. Busic*, 587 F.2d 577, 586 (3d Cir.1978), rev'd on other grounds, 446 U.S. 398,100 S.Ct. 1747 (1980). Pedroni does not assert that these three witnesses were not available to him.

Pedroni's argument that the District Court erred by failing to charge the jury with a unity of purpose likewise fails. The District Court instructed the jury that it had to find "'a unity of purpose' or a 'common design' to do something that the law forbids." App. at 631. This more than substantially covered Pedroni's proffered additional (and therefore unnecessary) instruction.

Pedroni argues that the District Court failed to inform the jury that each element of the offenses had to be found unanimously. Again, reviewing the jury charge in its entirety, the District Court adequately charged the jury. The District Court instructed that the jury "must be unanimous as to which

one of the objects of the conspiracy the defendant agreed to pursue," App. at 627-28, and that the jury "verdict must be unanimous." App. at 659. The jury was properly charged.

Pedroni also takes issue with the instructions to the jury that it should disregard evidence that Pedroni lacked a stake in the venture. We have previously held that the government need not prove "that each conspirator expected to benefit from the conspiracy" in order to support a conspiracy conviction. *United States v. Shoup,* 608 F.2d 950, 957 (3d Cir.1979). The instruction was correct.

C. Undercover Operation

Pedroni argues that the Government's payment of cash "bribes" to Pedroni's broker, Robert Recek, induced Pedroni to sell fuel to the Government's undercover business. The record reveals that in May of 1991, the Government established an undercover business. Pedroni became the undercover business' first supplier. The undercover agent initially secured supplies from Pedroni through Pedroni's broker, Recek. In addition to the normal broker's fee, the undercover business payed Recek an additional .5¢ per gallon for every gallon of fuel secured from Pedroni.

Whether the Government's conduct in running the undercover operation was so outrageous as to violate Pedroni's due process rights is a legal question over which our standard of review is plenary. *United States v. Driscoll*, 852 F.2d 84, 85 (3d Cir.1988). We have expressed the view that, "to the extent a government misconduct defense distinct from entrapment is available, it 'must be predicated on intolerable government conduct which goes beyond that necessary to sustain an entrapment defense.'" *Id.* at 86 (citing *United States v. Jannotti*, 673 F.2d 578, 606 (3d Cir.1982) (en banc), *cent. denied*, 457. U.S.1106, 102 S.Ct. 2906 (1982)). We reject Pedroni's contention that the undercover government business and agent, with the help of Recek, rose

to a level that violated Pedroni's due process rights. The Government did not initiate the criminal activity and Pedroni actively and willingly participated in it. *See, e.g., United States v. Twigg*, 588 F.2d 373 (3d Cir.1978) (government approached defendant and supplied all essential material and equipment for methamphetamine production); *United States v. West*, 511 F.2d 1083 (3d Cir. 1975)(government suggested narcotics sale and provided source of the supply for the sale and arranged the sale to another undercover agent).

D. Expert Witnesses at Trial

Pedroni asserts that the District Court erroneously permitted three Government withnesses to offer expert opinions that Pedroni was a part of the criminal conspiracy. A decision to admit expert testimony is reviewed for abuse of discretion. *United States v. Gibbs*, 190 F.3d 188, 211 (3d Cir. 1999), *cert. denied*, 528 U.S. 1131, 120 S.Ct. 969 (2001) (citation omitted). The trail judge is given "broad discretion" to admit or exclude such testimony, based upon whether it is helpful to the of fact. *Id.* (citing Fed.R. Evid.702).

The three witnesses are Malcolm Fox, Paul Malloy, and Steven Bursey. As an initial matter, the Government did not offer Fox as expert witness and the District Court did not allow Fox to testify as an expert. As a lay witness, Fox was allowed testify to opinions and inferences if they were "(a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge with the scope of Rule 702." Fed R. Evid. 701. A review of the record reveals that Fox's testimony fell within the permissible parameters of Rule 701. We find no abuse of discretion concerning the Fox testimony.

Malloy an IRS agent, testified about tax returns and financial transactions, the taxing structure as it pertained to motor fuel excise tax, and taxes and the methods of evasion

or tax fraud (as elicited on the record by Pedroni's counsel after the Government presented evidence concerning Malloy's qualifications). Bursey, a former FBI Special Agent, testified about his experiences as an undercover agent operating the undercover business to which Pedroni sold fuel on several occasions.

Our review of the record has failed to uncover any evidence where these two witnesses explicitly opined about Pedroni's part in the conspiracy. Gibbs, 190 F.3 d at 212 ("Where an expert in a criminal case has not explicitly testified about a defendant's intent, courts [are] reluctant to exclude the expert's testimony under Rule 704(b)." (emphasis added)). Many of the passages from the transcript challenged by Pedroni are statements made by the witnesses in response to questions posed on cross-examination. The District Court did not abuse its discretion in allowing these witnesses to testify.

E. Evidence of Other Conspiracies and Other Charges

Count 38 of the Superseding Indictment charged one of Pedroni's coconspirators, Daniel Enright, with a conspiracy to extort money from two other coconspirators. Pedroni argues that this Count, along with other charges in the Indictment, had nothing to do with him and that he was prejudiced by the District Court's decision to deny his motion for severance. The "other charges" in the Indictment include: Count 39 which charged Enright and Wasserstrom with committing a currency reporting violation; evidence concerning Enright's personal returns for 1990 through 1993; evidence of excise tax evasion occurring after Pedroni stopped providing fuel to the daisy chain; evidence of wire fraud and money laundering charges involving payments to different suppliers; and evidence that Enright received millions of dollars of income from his participation in the conspiracy.

Rule 14 of the Federal Rules of Criminal Procedure states:

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or other defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

The burden of showing prejudice lies on Pedroni. *United States v. Eafrasio*, 935 F.2d 553, 568 (3d Cir.1991). Our review of the District Court's denial of the severance motion requires that we "first determine from the record as it was when the severance motions were made, what trial developments were then reasonably foreseeable, and in that light decide whether the court abused its discretion denying severance." *Id.* If we determine that the District Court abused its discretion, then we must determine whether the denial caused trial prejudice, asking "whether the jury could have been reasonably expected to compartmentalize the allegedly prejudicial evidence in light of the quantity and limited admissibility of the evidence." *Id.*

We hold that the District Court did not abuse its discretion in denying Pedroni's Rule 14 severance motion. Severing Pedroni's trial was not required, even if some potential for prejudice might be associated with evidence of the Enright extortion conspiracy and other charges in the Indictment unrelated to Pedroni. "Prejudice should not be found in a joint trial just because all evidence adduced is not germane to all counts against each defendant." *Id.* In addition, the District Court instructed the jury to "carefully weigh the evidence relating to each defendant and each charge," which it clearly did when we observe it convicted Pedroni on only one count and acquitted him on all remaining counts. We see no abuse of discretion.

F. Other Allegedly Prejudicial Evidence

Pedroni raises a number of challenges to the order of the District Court's to admit evidence on and concerning tapes made by undercover agents relating to the undercover business. Pedroni argues that the evidence should have been excluded under Rule 404(b) of the Federal Rules of Evidence.

Federal Rule of Evidence 404(b) is a "codification of the common law prohibition against the admission of evidence of prior crimes, wrongs, or other acts relevant solely to prove the defendant's 'general criminal predisposition to do wrong.'" *United States v. Scarfo*, 850 F.2d 1015,1019 (3d Cir.1988) (citation omitted) (emphasis added). The rule prohibits the admission into evidence of extrinsic acts intended to prove a defendant's propensity for crime or to suggest to the jury unfavorable inferences reflecting on his character. But evidence that bears on a relevant issue in a case, though possessing the potential to damage the defendant's cause, "is not inadmissible for that reason alone." *Id.* at 1018-19. If the evidence is offered for another proper reason, "the same evidence of other crimes or acts is subject only to the ordinary limitations under Rules 402 and 403," which include undue prejudice *Id.* at 1019. Intended as a "rule of inclusion," the possible uses of other crimes evidence has been used to prove such things as: motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, background information, parties familiarity with one another, concert of action, parties continuing relationship, and to assist jurors in understanding defendant's role in the scheme. *Id.* (citations omitted). Before admitting evidence of other acts under Rule 404(b), the District Court must ask, "Whether that evidence is probative of a material issue other than character." *United States v. Huddleston*, 485 U.S. 681, 685,108 S.Ct. 1496,1499 (1988). Under Rule 403, the District Court must "appraise the genuine need for the challenged evidence and balance that necessity against the risk that the information will influence

the jury to convict on improper grounds." Scarfo, 850 F.2d at 1019. Our review of a District Court's decision to admit or exclude evidence is for abuse of discretion, "and such discretion is construed especially broadly in the context of Rule *United States v. Mathis*, 264 F.3 d 321, 326-27 (3d Cir. 2001).

As the record clearly reveals, the District Court performed the balancing test mandated under Rule 403 and admitted those portions of the topes which it found were not unduly prejudicial to Pedroni. Despite Pedroni's challenges to the contrary, the District Court gave proper and timely limiting instructions with regard to the challenged evidence which it admitted. The District Court also conducted a careful review of the tapes, and excluded those portions of the tapes which it found excludable under Rule 403. We find no abuse of discretion.

G. Restitution

Pedroni argues that the District Court improperly ordered him to pay $500,000 in restitution. We review the appropriateness of a District Court's award of restitution for abuse of discretion. *United States v. Simmonds*, 235 F.3d 826, 829 (3d Cir. 2000).

As the Government aptly points out, the District Court could have ordered up to $74 million dollars in restitution, given that the total loss was estimated at $132 million and the loss associated with the charges for which Pedroni was acquitted totaled almost $58 million. In such a light, we find no abuse of discretion in the District Court's (rather generous) restitution order.

III.

We have thoroughly reviewed all the arguments presented by Pedroni in his submissions to this Court, and those presented at oral argument, and find no basis to disturb the

conviction or the sentence imposed by the District Court. The judgment of the District Court entered on March 8, 1999, will be affirmed.

TO THE CLERK:

Please file the foregoing opinion.

/s/ Robert E. Cowen
United States Circuit Judge

APPENDIX E

Amendment X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Section 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Section 1343. Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.